United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-6080 77-7240 77-7242

To be argued by: JAY TOPKIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-6080, 77-7240, 77-7242

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

-against-

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION and THE HARTFORD FIRE INSURANCE COMPANY,
Defendants-Respondents,

-and-

AVIS, INC.,
Defendant-Intervenor-Respondent.

ROBERT PRATHER,
Plaintiff-Appellant,

-against-

AVIS, INC., et al.,
Defendants-Respondents.

SIDNEY H. MILLER,
Plaintiff-Appellant,

-against-

AVIS, INC., et al.,
Defendants-Respondents.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF AVIS, INC.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000
Attorneys for Avis, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 77-6080, 77-7240, 77-7242

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

-against-

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION and THE HARTFORD FIRE INSURANCE COMPANY,
Defendants-Respondents,

-and-

AVIS, INC.,
Defendant-Intervenor-Respondent.

ROBERT PRATHER,
Plaintiff-Appellant,

-against-

AVIS, INC., et al.,
Defendants-Respondents.

SIDNEY H. MILLER,
Plaintiff-Appellant,

-against-

AVIS, INC., et al.,
Defendants-Respondents.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF AVIS, INC.

Contrary to the impression given by appellants' briefs, this is not an appeal from a final decision on the

merits: it is only an appeal from the denial of a preliminary injunction. All of the preliminary relief which appellants seek is now moot. Therefore, appellants cannot make the required showing of irreparable injury, and the appeal should be dismissed.*

Appellant Fuqua Industries, Inc. ("Fuqua") made an offer on May 17, 1977 to purchase 47 per cent of the stock of respondent Avis, Inc. ("Avis"), at a price of $15.50 per share. This stock is currently held by a Trustee, Richard Joyce Smith, appointed by the United States District Court for the District of Connecticut (Blumenfeld, J.), in United States v. International Telephone and Telegraph Corporation, et al., to carry out the divestiture of Avis from International Telephone and Telegraph Corporation. Before receiving Fuqua's offer, Mr. Smith planned

---

* Appellants ignore this Court's often repeated reminder that:

> "We have . . . very limited scope of review over interlocutory orders granting or denying a preliminary injunction."

Ames v. Associated Musicians of Greater New York, 359 F.2d 777, 778 (2d Cir. 1966). Accord: New York v. Nuclear Regulatory Comm., Dkt. Nos. 75-6115, 76-6022, 76-6081 (slip op. at 6196) (2d Cir., Feb. 14, 1977); Gillespie & Co. v. Weyerhauser Co., 533 F.2d 51, 53 (2d Cir. 1976); Carroll v. Associated Musicians of Greater New York, 284 F.2d 91, 92 (2d Cir. 1960).

Moreover, it is clear that, where a District Court with years of experience in a case draws upon its familiarity with the factual history of that case in denying a preliminary injunction, the scope of review is particularly limited. New York v. Nuclear Regulatory Comm., supra.

to sell two million shares of Avis stock, about half of his holdings, in a public offering. A Registration Statement for that offering was filed with the Securities and Exchange Commission on the same day that Fuqua's offer was received.

After the Trustee informed Fuqua that he intended to proceed with the public offering, Fuqua sought to intervene in United States v. International Telephone and Telegraph Corporation, et al., and asked the District Court to order that the Trustee accept the Fuqua offer.

At the same time, appellant Robert Prather -- a vice president of Fuqua who owns one share of Avis stock -- filed a complaint asserting that there were four misrepresentations in a Proxy Statement which Avis circulated in connection with its Annual Meeting of Stockholders. (P. 238a).* The Proxy Statement solicited votes on proposed amendments to Avis' Certificate of Incorporation and By-Laws. The Proxy Statement acknowledged that these amendments were intended to discourage any takeover of Avis which was not approved by Avis' independent Board of Directors.

Immediately after learning of the Fuqua and Prather charges on May 17, 1977, Avis prepared and circulated a Supplement to its Proxy Statement. (F. 53a). While the original Proxy Statement contained no material misrepresentations or

---

* References to the Joint Appendices in Prather v. Avis, Miller v. Avis, and United States v. ITT (Fuqua), are identified by "P", "M", and "F", respectively.

omissions, the Supplement, mailed on May 19, 1977, took pains to call to the stockholders' attention each of the allegations made by Fuqua and Prather, and all of the information they requested.

The third appellant, Sidney H. Miller, an Avis stockholder, filed a complaint on May 20, 1977, which simply echoes the allegations of Fuqua and Prather.

At a hearing on May 23, 1977, Judge Blumenfeld denied Fuqua's motion to intervene, and denied motions made by all three appellants to preliminarily enjoin the stockholders meeting. The next day, this Court (Feinberg, Danaher, C.JJ., and Dooling, J.), denied a stay of the District Court's order.

The stockholders meeting was held on May 25, 1977, and the proposed amendments were duly enacted. Therefore, appellants' motions to enjoin the stockholders meeting are moot.

At the hearing on the stay application, Fuqua and Prather, for the first time, asked this Court to stay the proposed public offering, then expected to take place in mid-June.* This Court declined to stay the proposed public offering. On this appeal, appellants again request this Court to enjoin the offering.

However, on June 6, 1977, Norton Simon, Inc. ("Norton Simon") made a formal offer to purchase all of the shares held by

---

* Appellant Miller sought to raise this issue in the District Court, by order to show cause. The District Court struck this paragraph from the proposed order to show cause, and the matter was not considered by the District Court. (M. 22a). Accordingly, this issue is not before this Court.

the Trustee for $20.25 cash per share. Norton Simon also committed itself to pay the same price in cash for all of the remaining Avis stock held by the public. (By contrast, Fuqua had said only that it was its "present intention" to offer an unspecified package of securities to Avis' public stockholders, at a value equivalent to $15.50.) In light of the Norton Simon offer, the Trustee has requested Avis to take the necessary steps to withdraw its Registration Statement for the proposed public offering, and Avis has complied. Thus, no offering of the Trustee's shares is now scheduled, and this branch of appellants' request for relief is also moot. Appellants can therefore show no irreparable injury which requires preliminary relief.*

Finally, appellants ask this Court to order modification of the District Court's Trustee Order No. 3 -- which now requires the Trustee to sell to the public rather than at private sale. This request is not only outside this Court's jurisdiction on this appeal; it is moot. For, after the Trustee received the Norton Simon offer, he asked the District Court to modify Order No. 3 to permit sale to Norton Simon. The District Court has scheduled a hearing on this application for June 15, 1977. Thus, there is no need for this Court to deter-

---

* See, e.g., Triebwasser & Katz v. American Tel. & Tel. Co., 535 F.2d 1356, 1359 (2d Cir. 1976),

> "the threat of irreparable harm . . . is a fundamental and traditional requirement of all preliminary injunctive relief. . . ."

mine, as appellants request, whether Trustee Order No. 7 should be amended or whether the District Court should be directed to hold a hearing on that subject, since the District Court is now proceeding with such a hearing. And, the issue of intervention would seem also to be moot -- Fuqua is free to apply to the District Court for leave to present its views on the relative merits of its offer and Norton Simon's.

The only other relief which appellants request on this appeal is that the Avis stockholders' vote on the amendments be declared void. This ultimate relief may not be granted on this appeal from denial of a preliminary injunction.*

Finally, there is no immediate threat of injury to Fuqua, other than the fact that it is in competition with other companies which are willing to acquire Avis, amendments and all. There has been no showing that any other potential bidder has

---

* We may note that the claims of alleged misrepresentations are without merit. For example, appellants claim the Proxy Statement was misleading in asserting that the amendments "could" discourage tender offers, rather than stating that they "will" discourage tender offers. As the Norton Simon offer makes clear, the amendments have not in fact discouraged tender offers and have apparently not even discouraged Fuqua. Appellants also claim that the Proxy Statement should have disclosed the date of the Trustee's proposed public offering. The Proxy Statement did disclose that such offerings were to take place, and Judge Blumenfeld held that the exact date was not material. (F. 261a). In any event, as noted above, the Trustee no longer plans to hold the offering. The other alleged omissions are similarly immaterial. Because the alleged omissions are immaterial, appellants have failed to show probable success on the merits, a requirement for a preliminary injunction. See Sonesta Int'l. Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973).

been deterred from seeking control of Avis because of the new amendments. On the contrary, Norton Simon's offer shows that the amendments will not deter meaningful offers.

In sum, there is no basis to grant preliminary relief. The appeal should be dismissed.

Dated: New York, New York
June 9, 1977

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
345 Park Avenue
New York, New York 10022
(212) 644-8000

Attorneys for Avis, Inc.